

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

MONDAY, THE TWENTIETH DAY OF DECEMBER
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE GODA RAGHURAM

-

WRIT PETITION NO : 1 of 2002

Between:

M/S Bliss Hotels Ltd., rep. by its Managing Director
M. Suryanarayana Reddy, Renigunta Road, Tirupathi
Chittoor District

..... PETITIONER

AND

1. The Government of Andhra Pradesh rep. by its Principal
Secretary, The Government of A.P Power & Energy Department,
Secretariat, Hyderabad
2. A.P. Transco rep. by its Chairman & Managing Director
A.P. Transco Vidyuth Soudha, Khairatabad, Hyderabad
3. The Chief Engineer (Commercial)
A.P. Transco Vidyuth Soudha, Khairatabad, Hyderabad

....RESPONDENTS

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed herein the High Court may be pleased to issue of Mandamus or any other appropriate writ, order or direction declaring the letter No. C E (Commrl.)/AAO/Rebate/D.No.794/01, dated 01.12.2001 of the respondent NO.3 as illegal, arbitrary and consequently direct the respondents No. 2 and 3 to implement the G.O. Ms. No. 31, dated 13.04.2001 and G.O. Ms. No. 32 dated 13.04.1994 in the case of the petitioner by granting 25% power rebate for a period of 3 years from 01.01.1996 and charging Industrial Tariff from that date and refunding the excess electricity charges already paid.

Counsel for the Petitioner: MR.C.V.NAGARJUNA REDDY

Counsel for the Respondents: MR.K.N.JWALA

The Court made the following:

ORDER:

The petitioner claimed 25% rebate in power bills in 1996 on the basis of an eligibility certificate issued by the District Industries Centre, Chittoor. This claim was rejected by the third respondent by an order dated 01.12.2001. This Writ Petition is filed challenging this order. A direction is also sought to the respondents 2 and 3 to implement the orders of the State Government-first respondent, in G.O.Ms.Nos.31 and 32 both dated 13.04.1994, by granting power rebate of 25% for the three-year period, commencing from 01.01.1996, for charging Industrial Tariff from 01.01.1996 and to refund the excess charges already collected from the petitioner by the respondents 2 and 3.

2. The petitioner is a limited company, which established a Star Hotel at Tirupathi in Chittoor District. According to the petitioner, the first respondent in G.O.Ms.No.654, Industries and Commerce Department, dated 13.07.1976, offered 25% rebate on power tariff for new Industrial units set up in the State, for a period of three years from the date of going into regular commercial production. This rebate was extended from time to time. In a subsequent order G.O.Ms.No.117 Industries and Commerce Department, dated 17.03.1993, the first respondent offered other incentives to the new industrial units set up in the State including continuance of the 25% rebate, originally offered by the Government in terms of G.O.Ms.No.654. In G.O.Ms.No.31 Tourism, Culture, Sports and Youth Services Department, dated 13.04.1994, the first respondent offered incentives to new hotel/motels constructed in all notified tourist centres. *Inter alia*, the incentives included investment subsidy and 25% rebate in power bills (both demand and energy) for a period of three years from the date of commencement of the business. The rebate was required to be allowed by the APSEB in the monthly bills, subject to a maximum of Rs.50 lakhs, for the three years period, in respect of major, medium hotel/motels and Rs.30 lakhs, in respect of small hotel/motels.

3. The petitioner established the hotel at Tirupathi pursuant to the promise of the State Government offering a succession of incentives including the one set out in G.O. Ms.No.31 supra. The petitioner commenced its operations with effect from 01.01.1996.

4. In circular No. 394/DSK.I(3)/77, dated 15.03.1977, the State Government issued instructions empowering the General Manager of the concerned District Industries Centre to issue an eligibility certificate to enable an enterprise to claim the 25% rebate on demand and energy charges. The petitioner, after the commencement of its business, approached the General Manager, Chittoor District Industries Centre for grant of eligibility certificate. A certificate issued as to the petitioner's eligibility and entitlement for the rebate for a period of three years with effect from 01.01.1996. The petitioner submitted this certificate along with an application to the Superintending Engineer, Tirupathi. The Superintending Engineer by the letter dated 04.11.1996 informed the petitioner that APSEB had issued orders that hotels/motels operating commercially are not entitled to the 25% rebate and informed the petitioner to take up the matter further with the APSEB. The petitioner then approached the APSEB. By the letter dated 12.12.1996 of the APSEB, the petitioner was informed that as hotels were not classified as indicated by the Board for extension of the 25% rebate, the petitioner is not entitled for the benefit.

5. Challenging the rejection the petitioner filed W.P.No.36347 of 1998 before this Court. The Writ Petition was disposed of by a Division Bench of this Court by the Judgment dated 24.07.2000, with a direction to enable the petitioner to make a representation to the authorities of the Board (APSEB) seeking extension of the benefits in B.P. Ms. No. 88 dated 29.11.1997 and on such representation made by the petitioner, the APSEB was directed to consider the same and pass appropriate orders within the time fixed.

6. Pursuant to the Judgment of this Court supra, the petitioner submitted a representation, dated 03.08.2000 to the APSEB claiming the rebate on energy charges. In G.O. Ms. No. 31 and another G.O.Ms.No.32, both dated 13.04.1994, the Government notified its decision to charge electricity tariff at the rate applicable to Industrial undertakings and not at the commercial rates as was the existing practice, for all tourism units. This G.O. specified that only those units recognized by the Tourism Department as per the norms prescribed, in notified tourism areas would be entitled to this concession and all eligible units should make a special application to

the APSEB for deriving the benefit of the Industrial Tariff.

7. Claiming benefits under G.O Ms. No. 31 and G.O. Ms. No. 32, the petitioner made a representation dated 03.08.2000, claiming that as the orders in these G.Os were issued by the Government appropos the provisions of Section 78(A) of the Electricity (supply) Act, 1948, the APSEB was obligated to effectuate the said policy and grant relief to the petitioners in accordance with the directives of the State Government.

8. In response to the above representation, the impugned order was issued by the third respondent. After setting out the chronology of events, to the petitioner's representation dated 03.08.2000 as well as the claims of the petitioner, in brief, the third respondent stated that the erstwhile APSEB had not adopted G.O. Ms. No. 31, that the orders therein are not binding (on the APSEB?), and that this position was also recognized by the Government, and that is why in G. O. Ms. No. 32 it was ordered that all eligible units should make an application to the APSEB for getting the benefits. He also further stated that pursuant to the orders of the Government in G.O. Ms. No. 60 dated 27.03.1999 which G.O was issued after consulting the AP Transco, the AP Transco issued T.O.O No. 228 dated 01.07.1999 to effectuate the Government orders in G. O. Ms. No. 60. As per the T.O.O. No. 228, dated 01.07.1999 certain conditions are enumerated for eligibility and the procedure for claiming rebate for new star hotels/motels situated in tourism notified areas, which are indicated in Annexure 1 and 2 of the Government Tourism Policy, 1998, which alone would be eligible for the 25% rebate on power bills (both on demand and energy) for a period of three years from the date of release of supply. T.O.O. No. 228, dated 01.07.1999 indicates that the impugned order does not render eligible expansion of existing projects for the purpose of rebate. Only those star hotels or new star hotels as indicated in the Annexure I and II of T. O.O. No. 228 are eligible for 25% rebate in power bills and since the petitioner is an existing hotel, but not new star hotel and is deemed to have been functioning from 09.12.1995 and the release of supply was made to it, it is not eligible (in accordance with T.O.O. No.228) to assail the impugned order as a justification for rejection of the petitioner's claim. There are the stated bases for rejection of the petitioner's claim for benefits.

9. Earlier another similarly circumstanced hotel establishment, as the petitioner, claimed the benefits under G.O. Ms. No. 31 dated 13.04.1994. Such a claim having been rejected by the erstwhile APSEB, the said establishment M/s Venus Hotel and

others filed a Writ Petition seeking the rebate on the energy charges, relying on the benefits notified in G.O. Ms. No. 31 dated 30.04.1994. The APSEB resisted such claim, inter-alia on the ground that the order of the Government in G.O. Ms. No. 31 is not expressed to have been issued in exercise of the State Government's powers under Section 78 A of the Electricity (supply) Act, 1948, and that in any event the order of the State Government (in G.O. Ms. No. 31) was not adopted by the APSEB and therefore, the consumer could not rely on G.O. Ms. NO. 31 alone to claim the benefit of rebate, from the APSEB. This contention of the APSEB was negated by this Court and the Writ Petition is allowed, aggrieved by the same, the APSEB preferred a Writ Appeal No. 69 of 1998 which was dismissed by a Division Bench of this Court in **ANDHRA PRADESH STATE ELECTRICITY BOARD AND OTHERS v. VENUS HOTEL AND OTHERS..** This is what the Division Bench of this Court held in rejecting the Appeal of the APSEB:

"5. In our considered view the learned single Judge has rightly come to the conclusion that G.O. Ms. No.31, dated 30.04.1994 was a policy decision issued by the State Government granting concession. It is the just expectation of the citizen that the policy decision of the state would be carried out by all its instrumentalities without any reservation and if they have got any difficulty they will approach the appropriate authority for its modification, which is not the case in hand. Mere non-mentioning of a statutory provision in a policy decision would not render the policy voidable ab initio or unenforceable in law. Concededly, the policy decision on the facts does apply to the respondents. The only ground that it was not adopted by the Electricity Board does not denude the respondent No.1 from the right to the concession on the basis of which the respondent No.1 has established the industry nor it would be a ground for the appellant-Electricity Board to decline the concession to which the respondent is entitled as a State policy. In the eventuality of permitting an instrumentality of the state to run contrary to the State policies no State policy could be implemented and the progress of the State would be hampered. Nothing substantial has been found or submitted to take a view contrary to the findings arrived at by the learned single Judge to the effect that the policy does apply to the industry established by respondent No.1. The policy issued is squarely covered by a direction under Section 78 A of the Electricity (supply) Act, 1948. It does not require any specific mention or a specific direction to the instrumentalities of the state to follow its policy. In ordinary course the instrumentalities of the State are expected to follow the policy of the state framed from time to time."

10. In view of the decision of the Division Bench *supra*, it is clear that the orders of the State Government in G.O. Ms. No.31 and G.O Ms. No. 32 both dated 13.04.1994 are policy directives issued by the State Government referable to the powers of the State Government to issue such directions under Section 78(A) of the Electricity (supply) Act, 1948 which reads thus:

“78-A Directions by the State Government:

1. *In the discharge of its functions, the Board shall be guided by such directions on questions of policy as may be given to it by the State Government.*
2. *If any dispute arises between the Board and the State Government as to whether a question is or is not a question of policy, it shall be referred to the Authority whose decision thereon shall be final.”*

11. These policy directives do not require for their effectuation, adoption by the APSEB or its successor, the second respondent, herein, under the legal architecture obtaining prior to the commencement of the Electricity Act, 2003. The APSEB and the second respondent successor are implicitly bound by the policy directives issued by the State under Section 78-A of the Electricity (supply) Act, 1948 subject to such liberty of the APSEB to assail any such directives issued by the State Government before any appropriate authority including under Sub section (2) of Section 78-A of the Act 1948. In case any directives of the State have the effect of compelling the APSEB to violate any other legislative edict of the 1948 Act, such as for instance, the one contained in Section 59 of the said Act or in any other law for the time being in force, the APSEB would have been well within its rights, to either sensitize the State Government of the in appropriateness of the Government directives or in case the State persists with the policy directives, to challenge such directives in an appropriate manner. It would otherwise, be futile for these respondents to contend that such policy directives as are contained in G.O. Ms. Nos. 31 and 32 impinge upon the APSEB. It would also be futile for the respondents 2 and 3 to contend that the orders of the Government in G.O. Ms. Nos. 31 and 32 are not ipso facto effective and operational and require adoption by the second respondent so as to bind the second respondent to comply with the directives of the State Government. The later position has been made clear in the Judgment of the learned Single Judge as affirmed in the Judgment of the Division Bench in the

Venus Hotels case reported supra. Nothing is brought to the notice of this Court at the time of hearing of this Writ Petition that the Judgment of Division Bench in Venus Hotel and others case supra has been eclipsed by any interlocutory or final order of any Court. As long as this Judgment of the Division Bench operates, the respondents cannot be allowed to contend that without an adoption by the APSEB or AP Transco, the orders of the Government in G.O Ms. No. 31 or 32 do not apply or cannot be enforced.

12. Despite having been sensitized to the principles laid down in the judgment of the Division Bench of this Court in Venus Hotel and others case supra, as is apparent from the order of the Second respondent dated 01.12.2001, the APSEB contends that it has not adopted G.O. Ms. No. 31. Another curious logic adopted by the second respondent is that G.O. Ms. No.31 becomes operable only on its adoption by the APSEB. For this contention reference is made to a requirement in G.O. Ms. No. 32 wherein it is ordered that all eligible units must make an application to the APSEB. This is a non-sequitur, since the benefit of a rebate of the energy charges or a switch over from the commercial rate to the Industrial tariff should be passed by the APSEB, by way of abundant caution and to practically effectuate the benefit to the claimant, the State Government in G.O. Ms. No. 32 dated 13.04.1994 set out a procedure requiring an application to the APSEB whenever a claimant seeks the benefits. Neither expressly nor by any implication is obligation of APSEB as set out in G.O Ms. No. 31 dependant on adoption of this Government order by the APSEB, as held by this Court in Venus Hotel and others case supra.

13. Initially in the pleadings in this case, or at the hearing have the respondents demonstrated, that effectuating the orders of the State Government either in G.O. Ms. No. 31 or 32 or both, would involve a transgression of the fiscal discipline set out in Section 59 of the Act, 1948.

14. Sri N. Subba Reddy, learned Senior Counsel appearing for the respondents 2 and 3 strenuously contends that the Writ petition itself is not maintainable as the initial rejection of the petitioner's claim for the rebate in energy charges was in 1996 and this Writ Petition having been filed in the year 2002, in substance seeking refund of the electricity charges already paid by the petitioner, by applying the benefit of rebate, cannot be claimed in this Writ Petition under Article 226 of the Constitution of India. This is a mixed defence to the petitioner's presentation. Firstly the assumption is that as the petitioner's claim in this Writ Petition for refund is made

for the first time after 1996, the claim is time barred. This contention is stated to be rejected. Aggrieved by the refusal of the APSEB to grant a rebate benefit to the petitioner, he earlier instituted W.P. No. 36347 of 1998. A perusal of the Judgment of the Division Bench of this Court dated 24.07.2000 in the said Writ Petition, does not disclose that any such plea as to the reliefs claiming in W.P. No. 36347 of 1998 being barred by laches have been raised by the respondents in the said Writ Petition. Such is not the plea in the counter affidavit. At any rate, W.P. No. 36347 of 1998 appears to have been filed within two years of the rejection of the petitioner's claim in 1996. By the Judgment dated 24.07.2000 W.P. No.36347 of 1998 was disposed of permitting the petitioner a liberty to submit a representation before the respondents herein for benefits under any board proceedings including G.Os. The petitioner is, thus, seen to have acted with the requisite diligence in put forth his claims. In fact, she made a representation on 03.08.2000 shortly after the judgment of the Division Bench supra. It is on this representation that the impugned order was passed by the third respondent in December, 2001 and the present Writ Petition has been filed, in fact on 31.12.2001 within a month from the date of the impugned order. No question of laches, delay or the bar of limitation arises, in the circumstances.

15. No principle of law or precedent is placed before this Court in support of the other aspect of the

respondents, contention viz that no Writ Petition for refund of the excess energy charges paid by the petitioner would lie under Article 226 of the Constitution of India. The petitioner was ever claiming the benefits of rebate. These claims were initially rejected in 1996. The petitioner litigated by way of filing W.P. No. 346347 of 1998 and after disposal of the said Writ Petition, he made a representation and the said representation was rejected by the impugned order which is now challenged. It is in the passage of time during this litigative course that what was claimed for application of rebate stood transformed as a claim for refund, since energy charges were already collected by the respondents without giving the benefit of rebate to the petitioner. The petitioner still claims the benefit of the rebate, though the form of the benefit has altered from a monthly obligation of the benefit, to a refund of the amount of excess demand and energy charges already paid by him. On account of illegal refusal by the respondents to have extended to him the benefit under G.O. Ms. No. 31 and 32, the petitioner cannot be non-suited on this account of any extent principle

of law brought to the notice of this Court.

16. Sri N. Subba Reddy learned senior Counsel for the respondents 2 and 3 placed reliance on a decision of Supreme Court in **CHITTOOR ZILLA VYAVASAYA DARULA SANGHAM v. A.P.S.E.B AND OTHERS** . Very briefly the factual matrix that fell for the consideration of the Supreme Court in the above case was an assurance was given by the Chief Minister of the State of Andhra Pradesh in January, 1995, in the legislative Assembly, that electricity would be supplied for cultivation to ryots at the rate of Rs. 50 per H.P. per annum. Consequently the APSEB issued B.P. M.S. No. 110 dated 05.06.1995 reducing the charge to Rs. 50 Per H.P. with effect from 01.04.1995. Subsequently, as it was economically and financially disastrous to the Board, the Board appears to have brought it to the notice of the State Government. Thereafter, the board issued another order, B.P. Ms. No. 40 dated 03-09-1996 revising the tariff rates. These revised tariff rates were challenged as being contrary to the Government policy under Section 78-A of the Act and contrary to the assurance given by the Chief Minister. The validity of B.P. Ms. No.40, thus came to be considered by the Supreme Court particularly in the light of a detailed submission by the Board as to the financial implications of the earlier decision contained in B.P. Ms. No. 110 to the financial health of the APSEB. It is in this context that the Supreme Court held that:

“This field of policy direction (under Section 78-A) is not unlimited. There cannot be a policy direction which pushes the Board to perform its obligations beyond limits of the board to perform its obligations beyond limits of the said two sections. Any policy direction, which in its due performance keeps the Board within its permissible statutory limitations, would be binding on the Board. So, both State and the Board have to maintain its cordiality and co-ordination in terms of the statutory sanctions. If any policy direction pushes the Board in its compliance beyond statutory limitations. It cannot be a direction within the meaning of S.78-A, ruled the Supreme Court.

17. This principle is unexceptionable, apart from the fact that it is binding. The unit of statutory construction is the Electricity (supply) Act, 1948 and all its provisions must be read on an interactive analysis.

18. In the case on hand, however, it is neither pleaded nor demonstrated before the Court that compliance with the orders of the State Government in G.O. Ms. No.31 and 32 would bring about the situation where the APSEB or its new avator the AP

Transco the second respondent herein, would be compelled to violate the fiscal discipline obligated by Section 59 of the Act 1948. Mere assertion of the theoretical position without foundation in fact would not justify interference with the directives in G.O. Ms. No. 31 and 32. There may be a number of such Government policy directives ordering rebates or incentives to other sectors or class of individuals, such as agricultural sector. If the Board was of the view that implementation of all these various directives of the State would involve either financial ruination or a violation of Section 59 of the Act, it was open to the Board to sensitize the State Government so that the State would have prioritized its social policies, as to enable the Board to function within the fiscal discipline ordained in Section 59 of the Act. There is nothing on record to indicate that any such measure was undertaken by the Board either in general or in relation to G.O Ms. Nos. 31 and 32. The theoretical posturing of the APSEB does not therefore, have a foundation, in fact.

19. On the above analysis the petitioner is entitled to the relief claimed in the Writ Petition. The Writ Petition is accordingly allowed, the petitioner shall be granted the benefit of the rebate and tariff rate as per G.O. Ms. Nos.31 and 32, both dated 13.04.1994. It is however, open to the respondents 2 and 3 to decide whether the petitioner shall be granted refund of the excess charges paid by him on account of the respondents declining the grant of benefits of G.O Ms. No. 31 and 32 both dated 13.04.1994 or whether such excess amount collected from the petitioner should be adjusted in the future bills payable by the petitioner to the respondents 2 and 3, having regard to the fact that the petitioner is a going concern.

20-12-2004

kvrn

That Rule Nisi has been made absolute as above.

Witness the Hon'ble Sri Devinder Gupta, the Chief Justice on this Monday Twentieth December, two thousand and four.

To

1. The Government of Andhra Pradesh rep. by its Principal

Secretary, The Government of A.P Power & Energy Department,
Secretariat, Hyderabad

2. A.P. Transco rep. by its Chairman & Managing Director
A.P. Transco Vidyuth Soudha, Khairatabad, Hyderabad

3. The Chief Engineer (Commercial)
A.P. Transco Vidyuth Soudha, Khairatabad, Hyderabad

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